



1 contained in U.S.S.G. § 1B1.10(c).

2 Defendant asserts that he is entitled to relief under  
3 Amendments 552 and 709 of the Sentencing Guidelines. While neither  
4 amendment is listed in U.S.S.G. § 1B1.10(c), defendant nevertheless  
5 insists that both may be applied retroactively because they are  
6 "clarifying" amendments. See U.S.S.G. 1B1.11(b)(2). For several  
7 reasons, defendant's contentions are without merit.

8 Amendment 552, which took effect on November 1, 1997, modified  
9 U.S.S.G. § 2B3.1. Before the amendment was passed, § 2B3.1  
10 increased a robbery sentence by two levels "if an express threat of  
11 death was made." See *United States v. Day*, 272 F.3d 216, 217 n.2  
12 (3d Cir. 2011) (citing § 2B3.1(b)(2)(F)). Amendment 552 removed  
13 the word express, "modified the accompanying Commentary to  
14 acknowledge that either an explicit or implicit threat would  
15 suffice, and slightly altered the Commentary language to explain  
16 the provision's intent to raise the offense level in cases in which  
17 the offender instills in a reasonable victim a fear of death."  
18 *Day*, 272 F.3d at 217.

19 Whether Amendment 552 was a clarifying amendment and thus  
20 retroactively applicable is unnecessary for this court to decide.  
21 Amendment 552 was in effect at the time of defendant's sentencing  
22 in September 1998. Thus, Amendment 552 could not have subsequently  
23 lowered defendant's sentence because it impacted his sentence in  
24 the first place. Moreover, even if the amendment had not been  
25 applied, it did not change, much less lower, the range of  
26 defendant's sentence. "The deletion of the word 'express' plainly  
27 broadened the Guideline rather than narrowed it." *Day*, 272 F.3d at  
28 218. If anything, Amendment 552 further confirmed that the two-

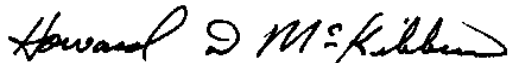
1 level enhancement for a threat of death was properly applied to  
2 defendant's sentence. As Amendment 552 did not subsequently lower  
3 defendant's sentence range, the amendment provides defendant no  
4 basis for relief.<sup>1</sup>

5 The Ninth Circuit has explicitly held that Amendment 709 is a  
6 not a clarifying amendment and therefore may not be applied  
7 retroactively. *United States v. Marler*, 527 F.3d 874, 878 n.1 (9th  
8 cir. 2008). Defendant's assertion that Amendment 709 is a  
9 clarifying amendment and should be applied retroactively to reduce  
10 his sentence is thus without merit.<sup>2</sup>

11 Accordingly, defendant's motion for relief pursuant to 18  
12 U.S.C. § 3582 (#138) is **DENIED**.

13 **IT IS SO ORDERED.**

14 DATED: This 22nd day of August, 2011.

15 

16 UNITED STATES DISTRICT JUDGE  
17

18 <sup>1</sup>It appears that what defendant is actually seeking here is a *de novo*  
19 review of the factual basis supporting application of the guideline  
20 Amendment 552 modified, § 2B3.1(b)(2)(F). This argument is implied by  
21 defendant's assertions that the government did not carry its burden in  
22 proving defendant had made a threat of death. (See Def. Mot. 4; Def. Reply  
23 3-4). His argument seems to be that Amendment 552 is a clarifying amendment  
and that because U.S.S.G. policy is to retroactively apply clarifying  
amendments, the court may reconsider whether the guideline provision  
Amendment 552 modified was properly applied in the first place. Defendant's  
position is without legal support, particularly where, as here, the  
enhancement would apply with or without the amendment.

24 <sup>2</sup> Defendant has previously sought relief pursuant to Amendment 709.  
25 The court rejected his argument on the grounds that Amendment 709 did not  
26 change the calculation of defendant's sentence and at any rate was not  
27 retroactively applicable. Defendant appealed to the Ninth Circuit. On  
28 August 19, 2009, the Ninth Circuit issued an order denying defendant's  
application to proceed *in forma pauperis*, and requiring defendant to both  
pay the filing fee and show cause why the challenged judgment should not be  
summarily affirmed. After defendant failed to respond to the circuit  
court's order, his appeal was dismissed.